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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 624

JOHN R. HENDRICKSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that his application for a Writ of Certiorari heretofore filed in the above entitled matter be reconsidered and that an order be made for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled matter as prayed for in the original petition.

OPINION BELOW, JURISDICTION AND STATEMENT OF FACTS

For reference to the opinion below, jurisdiction upon which this application is based and a statement of the case and the facts, the Court is directed to the original petition on file herein in which said matters are fully set forth.

BASIS FOR PETITION FOR REHEARING

Petitioner respectfully requests that the Court reconsider the original application upon the following grounds and for the following reasons:

1. That the conduct of the trial Court not only resulted in petitioner being absolutely deprived of a fair and equitable trial as was contended as the sole ground of the original petition, but was of such flagrant character as to completely depart from the accepted and usual course of judicial proceedings and to require and demand the exercise of the power of supervision vested in this Court.

2. That petitioner is being exposed to *dual jeopardy* and *dual punishment* in that the charged conspiracy and the aiding, abetting, counseling, inducing and procuring of the substantive offenses were one and the same acts.

ARGUMENT

In discussing the above contentions, we shall not repeat in any way the matters set forth in the orig-

inal petition. The authorities there cited and the references there made to the transcripts are adopted and we shall refer only to such additional authorities and additional transcript references as are necessary to present the points now being presented and which were not previously presented to this Court. (Rule 58.)

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1. THAT THE CONDUCT OF THE TRIAL COURT NOT ONLY RESULTED IN PETITIONER BEING ABSOLUTELY DEPRIVED OF A FAIR AND EQUITABLE TRIAL AS WAS CONTENDED AS THE SOLE GROUND OF THE ORIGINAL PETITION, BUT WAS OF SUCH FLAGRANT CHARACTER AS TO COMPLETELY DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND TO REQUIRE AND DEMAND THE EXERCISE OF THE POWER OF SUPERVISION VESTED IN THIS COURT

In the previous petition, it was contended that petitioner was deprived of a fair trial by reason of the actions of the trial Court both numerically and quantitatively in interrupting the progress of the trial for the examination and cross-examination of witnesses. The problem is much more serious and of far more import than was presented in the original petition. The action of the trial Court was so flagrant as to constitute a complete departure from any semblance of the accepted and usual judicial procedure. The judge in this case became the prosecutor. The approval of this conduct by the Court of Appeals for the Ninth Circuit and the tacit approval thereof by this Court by reason of a denial of certiorari will result in a complete breakdown of judicial procedure. In the almost unlimited excerpts set forth for the

examination of the Court in the original petition, Judge Bicks, the trial judge, made a consistent and concerted effort (and unquestionably was successful) to discredit each and every witness who had ever been associated with defendant in any way, shape or form. For example, we refer the Court to the testimony of Mr. Goedde commencing at page 297 of the transcript, line 1, and again at page 305 where the Court at length went into the fact that the witness was not an educated petroleum engineer, even though he had not at any time claimed to be one; the Court conducted himself in much the same manner in the examination of witness Maxwell Pearlberg commencing at page 387 of the transcript and with the witness Kennedy at pages 414, 446 and 456. The effect of this was that the government was allowed to and did cross-examine and criticize its own witness.

If the Court will seriously peruse the entire record, it will agree that there are so many of this type of action by the trial Court that a very severe prosecution attitude on the part of the trial judge is overwhelmingly established. Such instances are so vast in number that it is impractical and impossible to refer to each of them herein. As was said in a recent case in the State of California (*People v. Robinson*, 179 Cal. App. 2nd 624):

> "We do not imply that there was not substantial evidence of defendant's guilt nor do we express a doubt as to his guilt. Even if guilty, he was as much entitled to a fair trial as if he had been innocent. We do not believe he had a fair trial. When the court conducts the case of the prose-

> cutor as was done in this case, it constitutes in our opinion an irregularity which necessarily tends to balance the scales in favor of the people. Approval of the procedure disclosed by the record would establish a *most unfortunate precedent.* (Italics ours.)"

We cite this California case for the reason that incidents of such overbearing interference are very few and far between and examples are hard to find.

In that case, the Court stated further:

> "It should be understood that we are not considering a charge of misconduct as that term is commonly used. It is scarcely necessary to affirm our conviction that the court's participation in the trial was with the best of motives and without realization that it might have the effect of influencing the minds of the jurors."

The government has suggested that the failure of counsel to object precludes the consideration of this point. Once again the Court in the *Robinson* case spoke with considerable sense:

> "The people make the point that defendant registered no objection to the court's extensive participation in the trial of the case and that he failed to cite it as misconduct. It is contended that this precludes him from now urging the court's conduct as a ground for reversal of the judgment. We cannot agree with the People on this point. It is obvious to us that the Court considered it to be a part of its duty to render aid in the development of the case of the People and that any protest uttered by defendant's attorney

> would have been unavailing. It is not for lawyers to instruct judges as to their judicial duties. Defendant's attorney would have had to be on his feet as much of the time as he would have been seated if he had attempted to do so. Throughout the trial, defense counsel was respectful toward the court and the witnesses. We do not believe it would have been in the interests of his client to interpose continuous objections or to otherwise express disapproval or criticism of the court's actions and thus run the risk of incurring the disfavor of the jurors, and perhaps of the court. We do not doubt that to utter a protest every time the defense was hurt by an answer to the court's questions or to insist that the court desist from its procedure would have been a tactical mistake. (People v. Mahoney, 201 Cal. 618 (258 Pac. 607.)"

Such is the precise situation here. The trial Court went far beyond and did a great deal more than merely guide the conduct of the trial. A reading of the transcript leaves the unescapable conclusion that the trial Court *felt* that the defendant was guilty, *wanted* the defendant to be found guilty and left no stone unturned to see that the defendant *would be found guilty.* Even the sentence imposed is indicative. The Court not only imposed the maximum sentence on five counts but provided that those sentences run *consecutively.*

Another case which holds as does the *Robinson* case is *Williams v. U.S.,* 93 Fed. 2nd 685, where the Court said:

"One of the most meritorious assignments and specifications of error is the one which sets forth that the lower court 'erred during the trial of the case in indulging in acts of advocacy, in that the trial court, in examining and cross-examining witnesses and the defendants, virtually assumed the role of a prosecuting attorney.'"

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2. THAT PETITIONER IS BEING EXPOSED TO DUAL JEOPARDY AND DUAL PUNISHMENT IN THAT THE CHARGED CONSPIRACY AND THE AIDING, ABETTING, COUNSELING, INDUCING AND PROCURING OF THE SUBSTANTIVE OFFENSES WERE ONE AND THE SAME ACTS

The offenses charged in all but the first count of the indictment were of aiding and abetting the commission of embezzlement.

Although the offense of embezzlement standing alone does not necessitate the cooperation or concerted action of more than one person, the offense of aiding and abetting an embezzlement by necessity presupposes the concerted action or cooperation of two persons. If a crime necessarily involves the mutual cooperation of two persons and if they have, in fact, committed the crime, they may not be convicted of conspiracy to commit it. (*U. S. v. Zenuli*, 137 Fed. 2nd 845.)

Where proof of the substantive offense necessarily requires proof of conspiracy there is an identity of offense. In *Freeman v. U. S.*, 146 Fed. 2nd 978 at 979, where conspiracy in sale of narcotics was involved, the Court found identity of offenses in that

the proof of the substantive offense necessitated proof of the conspiracy. See also *Krench v. U. S.*, 42 Fed. 2nd 354.

Nor can conspiracy be divided or split into numerous different conspiracies for the purpose of prosecution.

U. S. v. Cohen, 197 Fed. 2nd 26;
U. S. v. Owens, 21 Fed. 2nd 868 at 871;
U. S. v. Sall, 116 Fed. 2nd 745.

This problem has been before this Court on at least two prior occasions and although the cases were not decided in accordance with this argument in both cases strong dissenting and concurring opinions pointed out its validity.

See

Pinkerton v. U. S., 328 U. S. 640;
Krulewitch v. U. S., 336 U. S. 440.

The result of holding otherwise is obvious—as in this case, the defendant is convicted twice and punished twice for performing exactly the same act.

To hold conspiracy and aiding and abetting separate and distinct offenses *under the facts of this case* is to allow the doctrine of conspiracy to expand beyond the limits of logic.

CONCLUSION

The aggressive, abusive and overzealous interference by the Court throughout all stages of this trial cannot possibly have failed to have had an effect upon the jury. If such conduct by trial judge were dis-

played by counsel for the prosecution this Court would not hesitate to reverse the conviction, if not on the basis of deprivation of defendant's right to a fair trial, then upon hesitation to sanction such procedure by silence.

We have here a case where the actions of the trial Court were not slight or confined to a single instance, but one where they were pronounced, persistent and biased with a cumulative effect on the jury which cannot be disregarded as inconsequential.

The Courts as well as the officers of such Courts must conduct themselves in such a manner as to guarantee to the defendant a fair and equitable hearing under the proper and inviolate rules for the administration of justice.

This conduct of the trial Court coupled with the fact that petitioner was tried, convicted and sentenced for two crimes arising out of the same acts certainly calls for careful and exhaustive consideration by this Court.

We respectfully submit that the writ should be granted.

Dated, Fresno, California,
March 9, 1962.

WILLIAM M. MILES,
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CERTIFICATE OF COUNSEL RELATIVE TO GOOD FAITH OF APPLICATION

William M. Miles, one of the attorneys for petitioner herein, certifies that the foregoing Petition for Rehearing on Application for Writ of Certiorari is filed in good faith and not for the purpose of delay; that counsel truly believes that the application is well founded and that the prayed for Writ of Certiorari should issue, and that it is restricted to substantial grounds not previously presented.

Dated: March 9, 1962.

Wm. M. Miles

Supreme Court of the United States

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SUBSTITUTION OF ATTORNEYS

I, John R. Hendrickson, defendant in the above entitled action, hereby substitute as my attorneys of record herein, William M. Miles, Wild, Christensen, Barnard & Wild and Robert G. Carter in the place and stead of Hiram W. Kwan and Arthur D. Cohen.

Dated this 2 day of March, 1962.

John R. Hendrickson

The undersigned Hiram W. Kwan and Arthur D. Cohen hereby consent to the foregoing substitution.

Dated this 2 day of March, 1962.

Hiram W. Kwan
Arthur D. Cohen

We, the undersigned, William M. Miles, Wild, Christensen, Barnard & Wild and Robert G. Carter hereby accept the foregoing substitution and agree to act as attorneys of record for the above named defendant.

Wm. M. Miles